Seventh Circuit were deceived. They were mislead into believing that significant mitigating evidence of petitioner's alleged procedural default (actual innocence) at the time of the original habeas corpus proceedings did not exist. It quite clearly did exist, *and that evidence was in the Wisconsin Department of Justice attorneys' possession,* via the Wisconsin prosecuting authorities, prior to the filing of the state attorneys' letter brief in opposition for order allowing petitioner's traverse to the respondent's answer or to petitioner's motion to amend his habeas petition and to petitioner's motion for reconsideration of the district court's order dated January 5, 1996, which state counsel filed on January 23, 1996 (DCTR 8), or prior to the filing of the state attorneys' response to petition for writ of habeas corpus, which state counsel filed on February 15, 1996 (DCTR 10), and prior to the state attorneys' filing of a letter in opposition to motion to supplement the pleadings to petitioner's traverse, which state counsel filed on March 5, 1996 (DCTR 14). In other words, the district court assumed that probative evidence as to Piscitello's employment with the government at the time of initiating contact with petitioner and at the time of the 1989 crime did not exist because state counsel failed to present it. Based on the natural assumption that such evidence did not exist because it was not presented at the habeas dismissal stage, the district court held that petitioner's allegations were "conclusory, fanciful, and even if true, would do little or nothing to undermine confidence in the result of [petitioner's] trial." (App. 31 of original petition.)

This leaves the third *Demjanjuk* factor. Here the question is whether the Wisconsin Department of Justice attorneys' conduct in failing to present available evidence of the government's involvement at the time of the 1989 crime was intentionally false, willfully blind to truth, or in reckless disregard for the truth. The principal bases for petitioner's petition and motions to amend petition for writ of habeas corpus were his allegations that trial counsel's investigation into Piscitello's background employment

with the government at the time Piscitello initiated contact with petitioner in April of 1989 did not reflect reasonable professional judgment in light of what trial counsel knew and suspected;[6] and prosecutorial misconduct based on the simple premise that the government egregiously invaded petitioner's innocent life and thereafter induced petitioner (an "unwary innocent") to participate in activities at the time of the 1989 offense, thereby requiring *suppression* of all post-April 1989 activities of petitioner, which typically occurs in cases with outrageous government conduct.[7]

So state counsel taking affirmative steps that prevented petitioner from presenting his habeas case fully and fairly when he knowingly withheld exculpatory materials from the petitioner relating to Piscitello's employment with the government situation in 1989 can be conceived of as "a fraud perpetrated . . . so that judicial machinery cannot perform in the usual manner." That is

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[6] *Cf. Wiggins v. Smith*, 539 U.S. 510, 123 S. Ct. 2527, 2542, 156 L. Ed. 2d 471 (2003) (holding that trial counsel's decision to end their investigation when they did was unreasonable in light of the evidence uncovered in the social service records).

[7] Applying the principals as established in *Russell v. United States*, 411 U.S. 423, 431-32, 93 S. Ct. 1637, 1643, 36 L. Ed. 2d 366 (1973) and *Rochin v. California*, 342 U.S. 165, 172, 72 S. Ct. 205, 96 L. Ed. 183 (1952), petitioner can actually overturn his conviction by proving (a) under the "scope of employment" rule that Piscitello was in fact acting in furtherance of the government's work at the time he initiated contact with petitioner in April of 1989 and (b) that petitioner was not indeed engaged in any criminal activity in April of 1989. Therefore, *Russell* and *Rochin* demonstrate that all the progression of events that Piscitello (the government) induced petitioner to participate from April of 1989 to the August 1989 murders must be removed from the testimonies of those state witnesses used against petitioner, at which no reasonable fact-finder could conclude that petitioner were a party to the 1989 offense upon which he was convicted. This suppression analysis also covers the succession from petitioner's arrest to extradition to the criminal complaint to the preliminary hearing to bindover. In a word, petitioner and his family should not have been subjected to the disgrace and humiliation of a trial here.

precisely what happened in this case. The district court and Seventh Circuit were prevented from administering full justice because those courts lacked all of the vital information necessary to afford the proper relief. Thus, but for Wisconsin Department of Justice attorneys' fraud, this habeas matter would have gone in a different direction, and petitioner would have been released to outright freedom as planned in 1996 – especially since state attorneys had precisely what petitioner needed to prove his ineffective assistance of trial counsel and outrageous government conduct claims, as reflected by petitioner's 1995 habeas petition and supporting papers.

CONCLUSION

For the above reasons and those as established in petitioner's original habeas petition filed on June 1, 2005 the Supreme Court of the United States should invoke those inherent equitable powers to protect the integrity of the judicial process within the Court's appellate jurisdiction and thus grant the prayed for writ and remand the case to the district court or a duly-appointed Special Master under the authority of 28 U.S.C. § 2241(b) with directions to conduct a prompt and full evidentiary hearing on petitioner's non-frivolous claims of ineffective assistance of trial counsel, outrageous government conduct and fraud upon the court, so as to ascertain the truth.

Dated at Waupun, Wisconsin this 5th day of August 2005.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

SCOTT A. HEIMERMANN,

Petitioner,

v.

Case No. 95-C-1101

GORDON A. ABRAHAMSON,

Respondent.

ORDER

(Filed July 8, 2002)

On October 30, 1995, Scott Heimermann, filed in this court a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, challenging his 1992 state court conviction on two counts of first degree intentional homicide. He claimed that his trial had been marred by numerous constitutional defects, including ineffective assistance of counsel. In support of his ineffective assistance claim he asserted that his attorney should have consulted with him regarding certain strategic decisions, should have investigated the alleged relationship between a key witness and law enforcement (including certain officers' knowledge of, and possible acquiescence in, the murders), and should have challenged the authenticity of a particular piece of evidence introduced against him.

The court reviewed Mr. Heimermann's claims pursuant to Rule 4 of the Rules Governing Section 2254 Cases and found them all to be legally or factually unsupportable, with the exception of the ineffective assistance (sub)claim premised on counsel's failure to challenge the authenticity of certain evidence. Accordingly, on January

5, 1996, the court summarily dismissed all of Mr. Heimermann's claims but the one. With respect to the (sub)claim that counsel should have investigated law enforcement's possible knowledge of, or acquiescence in, the charged murders, the court found Mr. Heimermann's assertions "conclusory, fanciful, and even if true, would do little or nothing to undermine confidence in the result of Heimermann's trial." (*Heimermann v. Abrahamson,* No. 95-C-1101 at 11 (E.D. Wis. Jan. 5, 1996.)

On June 24, 2002, Mr. Heimermann filed a Federal Rule of Civil Procedure 60(b) motion for reconsideration of the court's January 5, 1996 decision summarily dismissing his ineffective assistance of counsel subclaim premised on failure to investigate the alleged relationship between a witness and law enforcement officials. He asserts that in 2000 he initiated contact with the witness and that the witness verified that he had worked with law enforcement[1] as a confidential informant, that he had warned his handlers prior to the murders that they might be forthcoming, and that his handlers did nothing to prevent them. Thus, Mr. Heimermann asserts, his 1995 allegations were not fanciful (as the court had previously suggested).

Rule 60(b) relief is considered "an extraordinary remedy that is to be granted only in exceptional circumstances." *Provident Sav. Bank v. Popovich,* 71 F.3d 696, 698 (7th Cir. 1995). Because finality is an important value in a procedural system, a litigant who seeks to set aside a

[1] It appears that the witness admitted to working with law enforcement officers investigating drug activity, not the officers who investigated the murders of which Mr. Heimermann was convicted, or any other officer associated with Mr. Heimermann's case. The exact contours of the supposed admission are not entirely clear, however.

final judgment under Rule 60(b) has an especially heavy burden; among other things he must demonstrate that he has a meritorious position in the underlying suit. *See Philips Med. Sys. Int'l B.V. v. Bruetman,* 8 F.3d 600, 603 (7th Cir. 1993).

Pursuant to Rule 60(b), a court may grant relief from judgment only under the particular circumstances listed in the rule. *Russell v. Delco Remy Div. of Gen. Motors Corp.,* 51 F.3d 746, 749 (7th Cir. 1995). Those are:

> (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

Fed. R. Civ. P. 60(b). Importantly, clause (6) is mutually exclusive of the first three clauses; if the asserted grounds for relief fall within the terms of clauses (1)-(3), relief under the catchall provision of subsection (6) is not available. *Brandon v. Chicago Bd. of Educ.,* 143 F.3d 293, 295 (7th Cir. 1998). This distinction is significant because clauses (1)-(3) have a one-year statute of limitations, *see* Fed. R. Civ. P. 60(b), while motions for reconsideration under clause (6) may be filed at any "reasonable time," *id.*

Here, Mr. Heimermann asserts that the court's January 5, 1996 judgment may be set aside under clause (4) or (6) of Rule 60(b). As he has not provided any basis for suggesting that the court did not have jurisdiction to hear his petition for a writ of habeas corpus in 1996 or that in adjudicating it the court acted in a manner inconsistent with due process, however, relief may not be granted under clause (4). *Cf. In re Edwards,* 962 F.2d 641, 644 (noting that a judgment is void for the purposes of Rule 60(b)(4) "if the court that rendered it lacked jurisdiction of the subject matter, or of the parties, or if it acted in a manner inconsistent with due process of law"). Similarly, as the whole premise of his motion is alleged newly-discovered evidence, relief may not be granted under clause (6).[2] *Cf. Brandon,* 143 F.3d at 295 (relief is not available under clause (6) for claims whose grounds would implicate clauses (1)-(3), including newly-discovered evidence). As Mr. Heimermann's motion lacks a basis in law, the motion must be denied.[3]

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[2] Relief may not be granted under the newly-discovered evidence clause, (2), because more than a year has passed since the court entered the judgment Mr. Heimermann wishes it to reconsider. *See* Fed. R. Civ. P. 60(b).

[3] The court notes that Mr. Heimermann's motion could alternatively be denied on the ground that it in no way suggests he had a meritorious position in the underlying petition. *Cf. Philips,* 8 F.3d at 603 (noting that reconsideration will not be granted unless the movant can show that his or her original action had merit). He has never demonstrated that reasonably competent counsel would have discovered the alleged circumstances of the relationship between the witness and law enforcement officials or that exposure of the relationship would have created a reasonable probability of a different result at trial. *Cf. Strickland v. Washington,* 466 U.S. 668, 294 (1984) (establishing elements of ineffective assistance of counsel claim).

Accordingly,

IT IS ORDERED that Mr. Heimermann's motion for reconsideration pursuant to Rule 60(b) be and the same is hereby **DENIED**.

Dated at Milwaukee, Wisconsin, this 8th day of July, 2002.

BY THE COURT:

/s/ J. P. Stadtmueller
J. P. Stadtmueller
Chief Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

SCOTT A. HEIMERMANN,

Petitioner,

v.

Case No. 95-C-1101

GORDON A. ABRAHAMSON,

Respondent.

ORDER

(Filed Dec. 18, 2002)

This matter is before the court on remand from the United States Court of Appeals for the Seventh Circuit. On October 30, 1995, *pro se* petitioner Scott Heimermann filed with this court a petition for a writ of *habeas corpus* pursuant to 28 U.S.C. § 2254 challenging his 1992 Wisconsin state court conviction for murder. On January 5, 1996, the court summarily dismissed his petition. On June 24, 2002, Heimermann filed a Federal Rule of Civil Procedure 60(b) motion for reconsideration of the court's denial of his petition premised on his trial counsel's failure to investigate an alleged relationship between a witness and law enforcement officials. On July 8, 2002, the court denied Heimermann's Rule 60(b) motion on the merits. On appeal, the Seventh Circuit vacated this court's July 8 order citing *Dunlap v. Litscher*, 301 F.3d 873, 875-76 (7th Cir. 2002) and in turn, *Harris v. Cotton*, 296 F.3d 578, 579-80 (7th Cir. 2002). (Both were decided subsequent to this court's order.) The court of appeals determined that the motion should have been dismissed for want of jurisdiction pursuant to 28 U.S.C. § 2244(b)(3) as an unauthorized

successive *habeas* petition. *Heimermann v. McCaughtry*, No. 02-3038 (7th Cir. 2002) (unpublished order). As acknowledged in *Dunlap*, the matter of the interrelationship between the AEDPA and Rule 60(b) is currently before the Supreme Court in *Abdur'Rahman v. Bell*, ___ U.S. ___, 122 S. Ct. 1605, 152 L. Ed. 2d 620, 70 U.S.L.W. 3650 (2002). (The case was argued on November 6, 2002.) In the interim this court is obliged to follow the Seventh Circuit's lead and dismiss Heimermann's Rule 60(b) motion for want of jurisdiction.

Accordingly,

IT IS ORDERED that Heimermann's Rule 60(b) motion be and the same is hereby **DISMISSED** for want of jurisdiction as an unauthorized successive *habeas* petition pursuant to 28 U.S.C. § 2244(b)(3).

Dated at Milwaukee, Wisconsin, this 18th day of December, 2002.

BY THE COURT:

/s/ J. P. Stadtmueller
J. P. Stadtmueller
U.S. District Judge

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

Submitted October 11, 2002
Decided October 24, 2002

Before

Hon. WILLIAM J. BAUER, *Circuit Judge*

Hon. FRANK H. EASTERBROOK, *Circuit Judge*

Hon. DANIEL A. MANION, *Circuit Judge*

No. 02-3038

SCOTT A. HEIMERMANN,
Petitioner-Appellant,

v.

GARY R. McCAUGHTRY,
Respondent Appellee.

Appeal from the United States District Court for the Eastern District of Wisconsin

No. 95-C-1101

J.P. Stadtmueller,
Judge.

ORDER

In June 2002, Scott Heimermann, a convicted murderer, filed a purported Federal Rule of Civil Procedure 60(b) motion in the district court. This motion sought to re-open a 1995 habeas corpus case. The 1995 habeas corpus attempt was actually only one of several; at last count, Heimermann has filed three separate 28 U.S.C. § 2254 petitions and a veritable barrage of requests for permission to file more. In Heimermann's latest maneuver, he argues that he has obtained "new evidence" showing that he was framed by law enforcement agents. Although Heimermann attempts to squeeze his arguments into Rule 60(b)'s framework, they are really the stuff of a new § 2254 petition. As such, the district court should have dismissed

Heimermann's motion for want of jurisdiction as an unauthorized successive habeas corpus petition. *See* 28 U.S.C. § 2244(b)(3); *Dunlap v. Litscher,* 301 F.3d 873 (7th Cir. 2002). We now VACATE the judgment and REMAND the case so that it may do so. The PETITIONER'S NOTICE OF MOTION AND MOTION FOR ADMISSION TO BAIL PENDING APPELLATE REVIEW, filed on October 3, 2002, by the pro se appellant is DENIED. The motion to proceed on appeal in forma pauperis is DENIED.